

The Right Hon^{ble} George, Earl of Huntingdon, Appellant.

Frances, Countess Dowager of Huntingdon; Theophilus, Ferdinando, Anne, Frances, Katherine and Margaret Hastings, Children of the said Countess, by Theophilus Earl of Huntingdon her late Husband, deceas'd; Sir Philip Meadows and John Gery, Respondents.

The Appellant's C A S E.

Novemb. 25, 1681.

BY Indenture Tripartite the said late Earl Theophilus and Elizabeth his then Wife (who was one of the Daughters and Co-heirs of Sir John Lewis and Mother of the Appellant) covenanted to levy a Fine of certain Lordships, Mannors, Baronies, Advowsons, Scites, Messuages and Hereditaments in the County of York (the Inheritance of the said Countess Elizabeth as one of the Co-heirs of the said Sir John Lewis)

To the Use of the said Countess Elizabeth and her Assigns, during her natural Life; and after her Decease

To the Use of the Appellant, and the Issue of his Body with several Remainders over.

In which Indenture was a Power for the said late Earl and Countess Elizabeth during their joyn't Lives to revoke the said Uses, and limit others, which Fine was levied accordingly.

The said late Earl being desirous to purchase the Place of Captain of the Band of Gentlemen Pensioners (for which he was to pay 4500 l.) by Promises he would pay the same out of the Profits of the said Place or otherwise when he could raise the same, prevailed with his said Countess Elizabeth to enable him to borrow that Sum: And for that Purpose

August 1, 1681.

The said late Earl and Countess Elizabeth by a Deed of Mortgage revoked the said former Uses (created by the said Deed of the 25th of November, 1681) and thereby declared, That the Premises (in Consideration of 4500 l. paid to the said late Earl) should remain and be,

To the Use of one Cropper (who lent the said Money) for the Term of 1000 Years, subject to a Redemption on Payment of 4500 l. and Interest; and after the Expiration, or other sooner Determination of the said Term,

To the Use of the said Countess Elizabeth and her Assigns during her natural Life.

The Remainder to the Appellant and the Issue of his Body with Remainders over as before.

And by the same Deed, the said late Earl covenanted, that he would pay off the said Mortgage-debt.

Accordingly the said late Earl (having by Perception of Profits of the said Place raised more than sufficient to discharge such Mortgage) did pay his said Debt, and the said Mortgage was fully satisfied, but (without the Privity of the said Countess Elizabeth or of this Appellant) caused the said Term of 1000 Years which had been vested by Mesne-Assignments in Mr. Newport and Sir William Cooper to be assigned to the the Respondent Meadows and Sir John Foch, in trust for the said late Earl, whereas the Debt being paid, and the end answered for which only the Appellant's Mother consented to incumber her Inheritance, the mortgaged Term ought to have been assigned to attend the Freehold and Inheritance of the Premises, of which this Appellant became seized on his said Mother's Death, which happened in January, 1688.

April 18 1699.

The late Earl made his Will whereby (after his Debts and Legacies therein mentioned) he gives the Residue of his personal Estate to the Respondents the Infants, and makes the Respondent Gery and Sir Gilbert Clark deceased, his Executors, and in 1701 the said late Earl dyed, having from the time of the Death of the Appellant's said Mother to his own Death received the Profits of the said Estate.

Michaelmas-Vacation, 1701.

Thereupon the Appellant exhibited a Bill in the Court of Chancery against the said Respondents, to have (amongst other things) an Account of the Profits of the said Estate received from the Death of his said Mother, and to compel the Respondent Meadows (the Surviving Trustee) to surrender up, or assign the said Term of one thousand Years, to the end, the said Estate might come to him free from the Incumbrance, which was satisfy'd as aforesaid: To which Bill the said Respondents having severally Answered and Witnesses being examined on both sides,

May 12, last.

The Cause was heard before the Right Honourable the Lord Keeper of the Great Seal of England, and his Lordship (*inter alia*) decreed, That the Respondent Gery, the late Earl's Executor, do account for the Rents and Profits of the late Countess Elizabeth's real Estate, which grew due and was received by the said late Earl or his Order, from and after the 30th of December 1688. (being the Time of the said late Countess's Death) in taking which Account, the Respondent Gery is to have a reasonable Allowance for the Appellant's Maintenance, from the Death of the late Countess his Mother, during the time he was kept and maintain'd by the said late Earl (unless for such time as the Appellant boarded in his Father's Family) and what upon the said Account shall appear remaining due (after the said Allowance, and others in the Decree mentioned) the same is decreed to be applied for and towards the Discharge of the Money due on the Mortgage in Question, which is to be ascertain'd by Mr. Pitt one of the Masters of the said Court of Chancery; and in case the Rents and Profits of the said Mortgaged Premises so received as aforesaid, shall not be sufficient to discharge the said Mortgage, then the Appellant is to pay the Residue to the said Executor as part of the said late Earl's Personal Estate, and on Payment thereof, the Respondents Meadows and Gery are to assign the said Mortgage to the Appellant, or to whom he shall appoint.

By which the Appellant (being in effect decreed to pay and discharge the said Mortgage) humbly conceives himself aggrieved thereby, for these Reasons :

First.

For that it appears, That the said Debt was wholly owing by the late Earl, and borrowed to serve his Occasions, and was never the Debt of the said late Countess Elizabeth, nor did any part of the Money come to her Use; and the Earl covenanted in the said Mortgage-Deed, to pay and satisfie the said Mortgage-money and Interest, which being perform'd, the Mortgage Term ought not any longer to have been kept on foot, ualefs to attend and protect the Inheritance, and not to charge it.

Secondly.

For that at the time of the Mortgage, this Appellant's said Mother, being Tenant for her Life, with Remainder to this Appellant in Tail, with Remainders over, and the Mortgaged Premises being her Inheritance, the same ought not to be charged farther, nor otherwise, than she agreed or consented to such Charge; and it cannot be thought that sheagreed to charge her Land any otherwise than to stand as a Security for her Husband, to enable him to borrow that Sum; and to be clear, when he (the Principal Debtor) should pay off the Debt, and not to make an absolute Gift of so much Money to her Husband, or that her Estate should stand Mortgaged to him, or any in trust for him, for that, or any other Sum.

Thirdly.

For that it appears by Proof in the Cause, That the Earl had promis'd the Appellant's Mother (to gain her to consent to the Mortgage) that he would pay off the said Mortgage-money, and discharge the Land.

Fourthly.

For that if no such Promise had been made, yet the said late Earl ought not in Conscience to be deemed to be a Mortgagee, or Incumbrancer on the Estate of the said late Countess and this Appellant, for having discharged his own Debt, Money borrowed by him only, and solely applied to his Use, and which he alone was liable to pay, and be sued for, by Virtue of his said Covenant.

Fifthly.

For that it seems not agreeable to Reason or Experience, That a Principal Debtor should (by paying the Debt he owes) become the Creditor, so as to charge his own Surety with the same Debt by any Means or Contrivance whatsoever.

For which, and other Reasons, the Appellant humbly hopes, your Lordships will Reverse that Part of the Decree which orders the Mortgage-money to be satisfied out of the Rents and Profits of the Appellant's Estate, and (if they fall short) by this Appellant: And that your Lordships will Order, That the Appellant may be answer'd the Rents and Profits of his said Estate from the Death of the said Countess, and that the said Sir Philip Meadows shall assign the said satisfied Mortgage to such Person or Persons as the Appellant shall direct.

WILLIAM COWPER.